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Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

RONNIE B. GREER,

Petitioner,

v.

DEBRA H. AMESQUA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Ronnie B. Greer was a firefighter employed by respondent City of Madison [Wisconsin] Fire Department. Greer was terminated by respondent commissioners of the Madison Police and Fire Commission for "whistle blowing" to local media that the Department chief, respondent Debra Amesqua, had illegally discriminated in favor of a training chief accused of abusing a Department recruit. During petitioner's discharge hearing, the commissioners refused to admit or consider Greer's offers of proof that Amesqua had, in fact, committed illegal discrimination. In Greer's subsequent action under 42 U.S.C. § 1983, respondents based their summary judgment motion on evidence neither presented to nor considered by the commissioners during the discharge hearing.

(1) Whether balancing competing interests for and against First Amendment protection of employee speech under *Pickering v. Board of Educ. of Township High Sch. Dist. 205, Will Cty. Ill.*, 391 U.S. 570 (1968) requires a government employer to consider the truth or basis in fact of an employee's allegations of official misconduct by the employee's superior?

(2) Whether a "reasonable" investigation under *Waters v. Churchill*, 511 U.S. 661 (1994) requires a government employer to consider evidence presented by a "whistle blower" employee that his allegations of official misconduct by his superior are true or have a reasonable basis in fact?

(3) Whether in a government employee's action under 42 U.S.C. § 1983 for discharge in retaliation for protected speech, an employer may rely on new evidence to support its disciplinary decision which was neither presented to nor considered by the employer during its administrative investigation and decision discharging the employee?

PARTIES

Petitioner. This Petition for a Writ of Certiorari is filed on behalf of Petitioner Ronnie B. Greer, who was plaintiff in the District Court, Western District of Wisconsin, and Appellant in the United States Court of Appeals for the Seventh Circuit.

Respondents. Respondents to this Petition for a Writ of Certiorari are Debra H. Amesqua, Alan Seeger, Margaret MacMurray, Byron Bishop, Lynn Hobbie, Mario Mendoza, the City of Madison Fire Department, the City of Madison, the City of Madison Police & Fire Commission, and Wisconsin Municipal Mutual Insurance Company, who were defendants in the District Court, Western District of Wisconsin, and Appellees in the United States Court of Appeals for the Seventh Circuit.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ronnie B. Greer respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered May 9, 2000.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Greer v. Amesqua*, 212 F.3d 358 (7th Cir. 2000). (Pet.-Ap. 1a.) The court of appeals' denial of Petitioner's petition for rehearing *en banc* was not separately

reported. (Pet.-Ap. 92a.) The decision of the United States District Court for the Western District of Wisconsin denying petitioner's motion for preliminary injunction is reported at *Greer v. Amesqua*, 22 F.Supp.2d 916 (E.D. Wis. 1998), *aff'd* 212 F.3d 358 (7th Cir. 2000). (Pet.-Ap. 60a.) The district court's decision granting respondents' motion for summary judgment was not reported. (Pet.-Ap. 27a.) The decision of the Madison Fire and Police Commission terminating petitioner was not reported. (Pet.-Ap. 94a.)

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on May 9, 2000. Petitioner filed a Petition for Panel Rehearing and Rehearing en Banc which was denied by Order dated June 21, 2000. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin Statutes §§ 62.13(1) - (5m) (1997 - 98) are reproduced in the Appendix. (Pet.-Ap. 122a.)

STATEMENT OF THE CASE

This case arises from petitioner's discharge from his government employment as a firefighter. Petitioner alleged that he was terminated in retaliation for legitimate whistle blowing to local media regarding his chief's illegal favoritism based on gender and sexual orientation.[1] In his discharge proceedings before the police and fire commission, he argued that in balancing the competing interests for and against First Amendment protection of his statements (*see Pickering v. Board of Educ. of Township High Sch. Dist. 205, Will Cty. Ill.*, 391 U.S. 570, 571-73 (1968)), the interests favoring protection were substantially greater if his statements were true or had a reasonable basis in fact than if the statements were reckless or false. Although the discharge proceedings constituted the commission's investigation under *Waters v. Churchill*, 511 U.S. 661 (1994), the commission refused to investigate whether the chief had, in fact, illegally discriminated, and further refused to admit or consider petitioner's extensive offers of proof (including expert testimony) of such illegal activity.

In petitioner's subsequent action against respondents under 42 U.S.C. § 1983, respondents based their motion for summary judgment on evidence neither presented to nor considered by the commission during the discharge hearing. Over petitioner's objection, the district court allowed respondents' evidence,

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[1] Discrimination based on gender or sexual orientation is prohibited under the Wisconsin Fair Employment Law, Wis. Stat. ch. 111, subch. II (§§ 111.31 - .395) (1997-98).

granted their motion for summary judgment, and was affirmed by the court of appeals. Consequently, petitioner's statement of the case recites facts in the light most favorable to petitioner, resolving all inferences in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). As the Ninth Circuit stated in *Johnson v. Multnomah County*, 48 F.3d 420 (9th Cir. 1995), it must be presumed that petitioner's statements and offers of proof regarding his chief's illegal conduct "were true and made in good faith." *Id.*, 48 F.3d at 427.

A. Relationship of Parties.

Petitioner Ron Greer was a firefighter employed by respondent City of Madison Fire Department from 1981 until July 31, 1998, when he was terminated by respondent City of Madison Police and Fire Commission ("PFC"). The Department and PFC are municipal entities created under Wis. Stat. § 62.13 (Pet.-Ap. 122a), which invests the PFC with certain governance functions including hiring and discipline of personnel. Respondent Debra Amesqua is Department chief. Respondents Alan Seeger, Margaret MacMurray, Byron Bishop, Lynn Hobbie, and Mario Mendoza were PFC "commissioners" who terminated Greer.

B. The Holtz-Cato Incident and Greer's News Release.

Amesqua was appointed chief in January, 1996, and shortly thereafter promoted Lt. Marcia Holtz to training chief. On October 3, 1996, Holtz (a white female) hit, shoved, and screamed at recruit Ron Cato (a black male) during a training exercise. (Greer Offer of Proof, ¶ 2, Pet.-Ap. 130a.) Although Holtz told Amesqua about the incident the same day (Internal Department Memorandum, Pet.-Ap. 153a), Amesqua did nothing. On November 5, 1996, a local television station which had covered the training exercise broadcast a videotape of the incident. (Copies of the tape are included in the record below.) On November 12, 1996, the president of Firefighters Local 311, Lt. Joseph Conway, informed Amesqua that Holtz had also

physically and verbally abused other firefighters. He demanded that Amesqua order an independent investigation and suspend Holtz pending its outcome. (Conway letter to Amesqua, 11/12/96, Pet.-Ap. 154a.)

On November 14, 1996, over one month after being informed of the incident, Amesqua finally agreed to an internal investigation. (Amesqua letter to Conway, 11/14/96, Pet.-Ap. 156a.) However, she refused to suspend or discipline Holtz and refused to investigate Conway's reports of Holtz's abuses of other personnel. (Conway Offer of Proof, ¶ 3, Pet.-Ap. 157a.) Amesqua assigned the investigation to Division Chief William Spohn, her direct subordinate whose professional advancement depended solely on Amesqua's discretion. (Greer Offer of Proof, ¶ 3, Pet.-Ap. 139a - 42a). Spohn gave her the investigation materials on December 17, 1996. (Spohn Investigation Memorandum, Pet.-Ap. 163a.) However, Amesqua took no action. One month later on January 15, 1997, Conway asked for a copy of the Spohn materials. (Conway letter to Amesqua, 1/15/97, Pet.-Ap. 165a.) By letter dated January 28, 1997, Amesqua refused Conway's request, stating that the matter was "still under investigation." (Amesqua letter to Conway, 1/28/97, Pet.-Ap. 166a.)

On April 9, 1997, Amesqua finally issued a two page decision, over four months after receiving Spohn's report and over six months after the incident itself. Even though Amesqua characterized Holtz's actions as "questionable" and "extraordinary," she concluded that they were "not unreasonable" and were, instead, "professional in content and germane." (Amesqua Decision Re Holtz-Cato Incident, Pet.-Ap. 168a.) Although Amesqua imposed a six month extension of Holtz's probation and directed her to take a "leadership training" seminar, the probation was suggested by Holtz herself (*id.*, Greer Offer of Proof, ¶ 5, Pet.-Ap. 133a) and the "leadership training" was actually a "perk" -- an exclusive program for promising, upwardly mobile officers at the

National Fire Academy in Emmitsburg, Maryland, with admission only by special recommendation from Amesqua. (Williams Offer of Proof, ¶ 5, Pet.-Ap. 170a.) On April 10, 1997, Amesqua delivered her decision to Local 311 which distributed copies to its members. (Amesqua letter to Conway, 4/10/97, Pet.-Ap. 178a.) On April 28, 1997, when it became clear that Amesqua would take no meaningful action against Holtz, Greer (who is a black male) issued a statement to local media titled, "News Release: Homosexual Chief rewards Homosexual Chief for Assault?" (News Release, 4/10/97, Pet.-Ap. 179a.)

In the News Release, Greer stated that Holtz had "shoved and screamed" at Cato, and that Amesqua had found her actions "not unreasonable." Greer stated that the leadership class was "coveted by other chief officers" to the extent that there was a "waiting list" to get in and that Holtz herself had suggested the six month probation extension. Greer said that Amesqua's decision would be "laughable [if] it were not such a serious matter." He stated that in over seventeen years of firefighting, he had never seen a situation where it was necessary to physically "assault" another firefighter. He said that Amesqua had "down played" and "swept over" the incident, and questioned the possibility that Spohn was unduly influenced or that Amesqua had simply disregarded Spohn's conclusions. Greer questioned whether Amesqua had engaged in illegal favoritism towards Holtz because of friendship or because they were fellow members of an organization called Women in the Fire Service ("WFS"). Greer said that most firefighters saw WFS as a predominately homosexual organization, and that both Amesqua and Holtz were homosexual women who had "clear agendas" regarding "women in the fire service." He questioned whether their "radical agendas" had "come [into] play" so that even "violence" could be "excused," "glossed over" or "rewarded." He also stated that Amesqua's decision appeared to be "the

much assailed 'good-ol-boy' system revived, repainted and given another name." *Id.*

At the time Greer issued the New Release, he was already under investigation for distributing an anti-homosexual pamphlet in his fire station. (PFC Decision and Order Terminating Petitioner, Pet.-Ap. 102a.) In the News Release, he questioned why the Department would spend thousands of dollars to investigate his peaceful communication, but would "wink[ ] at and reward[ ] physical assault." Greer also made similar comparisons to ongoing disciplinary actions against several other firefighters and noted, "Oh, by the way, that male trainee who was the victim, he was mysteriously 'let-go' literally days before graduating from the fire academy. Makes you go, 'Hmm.' /s/ Just sharing my thoughts with you all." (News Release, 4/10/97, Pet.-Ap. 181a.)

C. Investigation, Hearing and Termination.

When a local paper subsequently published an article about the News Release, Amesqua ordered an investigation by Personnel Chief Carl Saxe who recommended dismissal. (Saxe Investigation Memorandum, 6/5/97, Pet.-Ap. 183a.) Amesqua then brought charges against Greer before the PFC under § 62.13 (5) (Pet.-Ap. 123a-126a) which provides for a quasi-trial discipline process including service of formal charges, responsive pleadings, representation by counsel, a formal hearing, the right to compel witnesses, and specific statutory criteria to which the PFC's decision must conform. *Id.*

Amesqua alleged that the News Release violated various Department work rules including prohibitions against disrespect towards superior officers, bringing the Department into disrepute, and harassment based on sexual orientation. *Greer*, 212 F.3d at 366 n. 1. (Pet.-Ap. 10a.).

At the PFC hearing, Greer denied that the News Release violated work rules and claimed First Amendment protection for his statements regarding illegal favoritism. *Id.*, 212 F.3d at

370 - 73. (Pet.-Ap. 20a - 26a.) Greer's defense raised two questions under the "*Pickering*" test: (1) whether the News Release addressed a matter of public concern and (2) whether the Department's interests in suppressing his speech outweighed the interests of Greer, the public, the Department and other firefighters in protecting it. *See generally, Pickering*, 391 U.S. at 571 - 73, *Connick v. Myers*, 461 U.S. 137, 150 - 51 (1983) and *Rankin v. McPherson*, 483 U.S. 378, 386 - 388 (1987).

Greer argued that because exposing official corruption is a paramount governmental objective, the interests supporting protection were much greater if his statements were true or reasonable than if they were baseless, false or reckless. *Greer*, 212 F.3d at 373. (Pet.-Ap. 25a.) Further, because the truth of his statements was critical to the *Pickering* balance, the PFC was obliged to examine that issue as part of a reasonable investigation. *Greer*, 212 F.3d at 368. (Pet.-Ap. 15a.) (*See Waters*, 511 U.S. at 667 - 68. *Waters* was limited to "at will" employments. *Id.*, 511 U.S. at 671. The Seventh Circuit has applied *Waters*' "reasonable investigation" rationale to employments such as Greer's involving Fourteenth Amendment property interests. *Weicherding v. Riegel*, 160 F.3d 1139, 1143 (7th Cir. 1998).)

Defendants bear the burden of proving that an employee's statements are baseless. *See, Pickering*, 391 U.S. at 574 and *Rankin*, 483 U.S. at 388. Despite that burden, the Department offered only conclusory statements, and presented no evidence that the News Release was recklessly, intentionally or even negligently false. When Greer himself attempted to prove that his statements were true and reasonable, Amesqua and the Department moved to exclude his evidence, arguing that they did not address a matter of public concern and that their truth was irrelevant to the *Pickering* balance. In direct contradiction to her motion, Amesqua herself admitted that if Greer's allegations were true, someone "ought to blow the whistle."

(Hearing Transcript, 10/1/97, Pet.-Ap. 185a.) Saxe also concluded in his investigation report that Greer's statements, "if true," would "warrant suit against the City before the Equal Rights Division and/or charges filed against [Amesqua] before the PFC." (Saxe Investigation Memorandum, 6/5/97, Pet.-Ap. 182a.)

Despite ruling that Greer's statements did address a matter of public concern, the PFC granted the Department's motion, excluding as irrelevant all evidence regarding the "accuracy" or "empirical soundness" of Greer's statements except his "actual knowledge." (Hearing Transcript, 10/14/97, Pet.-Ap. 185a.) In a decision inconsistent with its own ruling to admit Greer's "actual knowledge," the Commission even excluded the videotape of the incident broadcast by the television station which Greer had seen and which was one of the principal bases for his comments in the News Release. (Dean Affidavit, ¶ 4, Pet.-Ap. 187a.) Remarkably, the PFC terminated Greer for making "uninformed and uninformative" statements about the videotape, yet admitted that they themselves never even reviewed or discussed the tape during their deliberations after the hearing. (PFC Decision and Order Terminating Petitioner, Pet.-Ap. 102a, Seeger Deposition, 5/4/99, Pet.-Ap. 190a, Mendoza Deposition,5/4/99, Pet.-Ap. 192a.)

At the PFC's direction, Greer submitted extensive offers of proof that his statements were true and well grounded in fact, including opinions of two nationally recognized experts, Chief George Friedell and Lt. Clarence Williams. Friedell was employed for thirty-five years by the New York City Fire Department, retired as a division commander of thirty-five fire companies, served for ten years as professor of fire science at City University New York (writing numerous courses in fire science) and now serves as instructor and consultant to legislative committees, insurance companies and other industries. (Friedell Offer of Proof, *vitae*, Pet.-Ap. 199.) Friedell concluded that Amesqua's decision, "at the very least,

smacks of favoritism." *Id.*, (Friedell Offer of Proof, letter attachment, Pet.-Ap. 196.) According to Friedell, Greer "had a right -- and perhaps a duty" to expose a situation which was "being downgraded and 'swept under the rug'." *Id.* He concluded that the "omissions by Amesqua clearly indicated a bias and predisposition [to] justify Holtz's conduct. . . . . [T]he strongest condemnation and severest sanctions of Holtz's conduct was warranted, not the justification provided by Amesqua." *Id.* (Friedell Offer of Proof, ¶ 20, Pet.-Ap. 194a and letter attachment, Pet.-Ap. 195a.)

Clarence Williams served twenty-five years with the City of Seattle Fire Department, is past president of the International Association of Professional Black Fire Fighters ("IABPFF"), was a member of the Joint Council of National Fire Service Organizations, and served as secretary of the twelve member Committee on Accreditation for the National Fire Protection Association ("NFPA"), the professional agency that certifies all state fire service training programs. Williams has experience in hundreds of discrimination cases as investigator, consultant, expert witness, affirmative action officer and IABPFF president. (Williams Offer of Proof, *vitae*, Pet.-Ap. 174a - 75a). He was a prevailing party in *Church v. City of Seattle,* 499 U.S. 901 (1991) and, as IABPFF president, he coordinated political, logistical and *amicus* activities in *Local No. 93, International Association of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, et al.*, 478 U.S. 501 (1986). Williams stated that the videotape alone was sufficient to establish that Holtz's actions were violent, excessive and abusive, and violated generally accepted standards for conduct by command officers." *Id.* (Williams Offer of Proof, ¶ 5, Pet.-Ap. 171a). He also stated that he would have denied NFPA certification for the Department had he observed Holtz's conduct, *id.*, and stated further that

> [A] male command officer engaging in such conduct against a female recruit would have been summarily

> dismissed from his position. . . . . [T]here is a clear likelihood of favoritism by Chief Amesqua, both in granting favorable assessments that were *not* warranted and withholding severe professional sanctions which *were* warranted.

Id. (Emphasis original.) Williams also concluded that, "In this case, there is clearly sufficient information . . . to justify a legitimate inquiry whether favoritism occurred based on the factors questioned by Greer in the News Release." *Id.*

Greer and Conway also submitted offers of proof based on their training and long experience as firefighters. Greer provided a detailed, reasonable basis for each statement in the News Release questioning the propriety of Amesqua's conduct. (Greer Offer of Proof, Pet.-Ap. 129a.) Saxe himself confirmed Greer's credibility, stating, "Ron is a lot of things, but he is not a liar." (Hearing Transcript, 2/3/98, Pet.-Ap. 200a.) Conway also stated that the videotape alone was clear evidence that Holtz had violated numerous Department work rules and policies. (Conway Offer of Proof, ¶¶ 5-6, Pet.-Ap. 158a.)

D. District Court Decision.

Following his termination, Greer commenced this action under 42 U.S.C. § 1983 to enjoin the termination and recover damages. In a published decision, the district court denied Greer's motion for a preliminary injunction. *Greer*, 22 F.Supp.2d at 918 (Pet.-Ap. 61a). The court noted that "exposure of wrongdoing by public officials" is a "classic" matter of public concern and that "[e]xposing a fire chief's alleged favoritism toward a subordinate officer falls into this category." *Id.*, 22 F.Supp. 2d at 927 (Pet.-Ap. 82a). However, the court dismissed entirely Greer's argument that the interests favoring protection were greater if they were true or reasonable and gave "no weight to . . . the 'truth' of his comment that Holtz's conduct is considered unacceptable in professional circles. . ." *Id.*, 22 F.Supp.2d at 930 (Pet.-Ap. 89a). The court

held that the Department was justified in removing "from its ranks a line firefighter who sends a news release to local media that challenges his chief's decision making on an internal personnel matter and speculates about her sexual orientation and that of another command officer." *Id.*, 22 F.Supp.2d at 929 (Pet.-Ap. 87a).

Thereafter, both parties moved for summary judgment. Respondents' evidentiary submissions consisted almost exclusively of Greer's deposition and Amesqua's affidavit which were created during the federal action over one year after the PFC completed its investigation and which were neither presented to nor relied upon by the PFC in its termination decision. Because a court's review of an employer's discharge decision is limited to "the facts as the employer reasonably found them to be," *Waters*, 511 U.S. at 667, Greer argued that, except for very limited evidence which was actually presented at the discharge hearing, all other evidence referenced from the deposition and affidavit was not relevant, and the court should have summarily denied respondents' motion.

The court agreed that it should "limit analysis of Plaintiff's First Amendment claim to the facts as reasonably found by the commission at the time it made its decision" and to "the record before the commission." (Decision and Order of the District Court Granting Summary Judgment, Pet.-Ap. 28a - 29a.) But in contravention of its own statements, the most basic rudiments of due process and the procedural requirements of *Waters*, the court granted respondents' motion, supporting its decision with an extensive recitation of facts from the deposition and affidavit. (*Id.*, Pet.Ap. 30a-31a.) The court's factual recitation included not only Greer's personal views on homosexuality elicited in the deposition, but also details of Greer's work and discipline history which were far beyond the cursory details contained in Department's submissions to the PFC. Those submissions consisted of only a single page from a prior PFC decision against Greer and a minimal summary of

discipline records of all employees. (PFC Decision and Order Suspending Petitioner, Pet.-Ap. 201a, Employee Discipline Summary, Pet.-Ap. 203a.)

As he had in the PFC and injunction hearings, Greer argued that if his statements about favoritism were true or reasonable, then the interest in exposing official wrongdoing was entitled to critical weight in balancing the competing interests. The court again rejected Greer's argument. "Contrary to plaintiff's assertions, the truth or falsity of the employee's speech is not necessarily a critical factor in public employee free speech cases generally and it is irrelevant in this case. (Citations omitted.)" (Decision and Order of the District Court Granting Summary Judgment, Pet.-Ap. 42a.) The court characterized *Wright v. Illinois Department of Children & Family Services*, 40 F.3d 1492 (7th Cir. 1994) as providing for a heightened interest in a statement's veracity only when the speech consists of sworn testimony. (Decision and Order of the District Court Granting Summary Judgment, Pet.-Ap. 43a.)

E. Seventh Circuit Decision.

On appeal, Greer raised three critical, threshold issues: (1) the district court permitted respondents' exclusive reliance on evidence neither presented nor relied on during the *Waters* investigation, (2) it approved the PFC's refusal to consider the truth of Greer's statements in conducting the *Pickering* balance, and (3) it found that even absent consideration whether Amesqua engaged in illegal discrimination, the PFC's investigation was "reasonable" as required by *Waters*.[2]

Remarkably, the court of appeals cited extensively from respondents' extra-record submissions without acknowledging

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[2] Greer also raised several other due process and equal protection challenges. Those were not Greer's primary issues on appeal, and are not addressed in this petition.

even that Greer challenged the propriety of that evidence. Just as in the district court, Greer's opinions which the court of appeals found horrific (such as his comparison of homosexuality to pedophilia and infidelity, *Greer*, 212 F.3d at 363 (Pet.-Ap. 4a)) were his personal views elicited in his deposition.

Addressing the *Pickering* test, the court did agree that "Whether public officials are operating the government ethically and legally is a quintessential issue of public concern." *Greer*, 212 F.3d at 371 (citations omitted) (Pet.-Ap. 21a). However, the court mischaracterized Greer's balancing argument as a claim that the truth of his statements made them "absolutely protected." *Id.*, 212 F.3d at 368. (Pet.-Ap. 25a.). Certainly mere truth does not provide *carte blanche* protection, but neither does it follow that truth is not relevant at all. If that were so, a legitimate whistle blower could be fired by a corrupt employer who is the very target of the employee's charges, all without any consideration whether the charges are true. Yet the court not only excused the PFC from considering whether Greer's charges were true or reasonable, it even approved prohibiting him from presenting his *own* evidence that they were.

The exclusion of Greer's evidence was particularly unfair because, indulging every conceivable inference *against* Greer, the court dismissed his statements as "unsubstantiated suspicions," *Id.*, 212 F.3d at 372 (Pet.-Ap. 22a), yet refused to consider his offers of proof. (Given the court's refusal to consider Greer's evidence, it is difficult to conceive how his statements could have been anything *other* than "unsubstantiated.")

For example,[3] the court criticized Greer's assertion that Amesqua had a "radical agenda," *id.*, yet refused to consider his offer of proof that after assuming command, Amesqua herself repeatedly called her own views "radical." In a WFS publication, *WFS Quarterly*, Winter, 1996, Amesqua stated, "We're going to have to re-engineer the fire service. You don't do this by locking yourself in to traditional thinking. We need radical, creative thinking." (Greer Offer of Proof, ¶ 20, Pet.-Ap. 147a.) Amesqua had also contracted with WFS to implement Values Enhanced Recruit Training ("VERT"). VERT was a program WFS itself had developed which, instead of simply training recruits in traditional fire suppression skills, was designed to change their personal values, social attitudes and viewpoints. *Id.*

The court also criticized Greer for "speculation" that Holtz and Amesqua were lesbians. *Id.* Yet it refused to consider Greer's offer of proof that they both displayed "gay liberation" bumper stickers on their cars, that Holtz was very open about her sexual orientation and about her relationship with Terese Floren who was executive director of WFS, that their orientation was widely discussed among Department members including the personnel chief, and that when an assistant chief sued the PFC for appointing Amesqua chief instead of him, a local paper carried the banner headline," Vorlander: Fire officials sought lesbian." (Greer Offer of Proof, ¶ 18, Pet.-Ap. 137a, Capital Times Article, 8/28/96, Pet.-Ap. 204a.) And although the court accepted and relied on respondents' extra-record submissions in finding Greer's statements baseless, it refused to consider Greer's extra-record submissions filed in response, which stated that Amesqua brought her companion to a press conference where the woman personally stated to Greer,

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[3] Three of the court of appeals' criticisms are presented for the sake of illustration. Greer submitted evidence addressing each of the court's other criticisms, as well.

"I'm her [Amesqua's] partner." (Greer Affidavit, ¶ 48, Pet.-Ap. 207a.) Even more important, the court failed to acknowledge that, as high profile commanding officers, both Amesqua and Holtz were public figures and subject to a much broader degree of public scrutiny. *See generally, New York Times v. Sullivan*, 376 U.S. 254 (1964).

The court further chided Greer for failing to lodge his complaints by the "proper manner and means" and for being "unwilling to let the firefighter's union address the matter . . . ." *Greer*, 212 F.3d at 371. (Pet.-Ap. 22.) Yet the court ignored Greer's proof that Amesqua had stonewalled Local 311 for over six months (*see* exchange of correspondence and Conway Offer of Proof, Pet.-Ap. 154a, 156a, 157a, 165a, 166a, 167a, 178a), that the PFC and other authorities did nothing during that time despite being aware of the situation, and that Chief Friedell concluded that it was Greer's "right" and perhaps his "duty" to expose the situation given the failure of Amesqua and the PFC to take "proper actions" and the token "slap on the wrist" ordered by Amesqua. (Friedell Offer of Proof, Pet.-Ap. 196a.)

Finally, addressing the investigation requirements under *Waters*, the court of appeals ruled that, despite the PFC's refusal to consider the truth of Greer's statements, its investigation was "quite sufficient under [the *Waters*] standard, and Greer enjoyed adequate opportunity to respond to the charges against him." *Greer*, 212 F.3d at 368. (Pet.-Ap. 15a.) It concluded, "The PFC needed only to ascertain a reasonable basis for finding whether Greer had violated Department rules, and '[only]' procedures outside the range of what a reasonable manager would use may be condemned as unreasonable." *Id.*, 212 F.3d at 363 (citing *Waters*, 511 U.S. at 678). (Pet.-Ap. 15a.) However, as noted already, if the truth of Greer's statements was relevant and essential to the *Pickering* balance, then investigating and considering the truth was likewise essential to the PFC investigation under *Waters*.

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND ITS OWN PRIOR HOLDINGS.

Ultimately, the court of appeals refused to consider the truth of Greer's statements. It concluded as dispositive that the Department's interest in preventing disruption and promoting "government efficiency" and "workplace morale" outweighed Greer's interests, *Greer*, 212 F.3d at 372 (Pet.-Ap. 24a), and that the PFC's "predictions of disruption" were entitled to "substantial weight," even though the News Release did not cause any actual disruption. *Id.*, 212 F.3d at 373. (Pet.-Ap. 24a.)[4] This holding is in direct conflict with the holdings of other circuits, which have determined without exception that the truth of a whistle blower's statements is relevant to the *Pickering* balance.

The Fifth Circuit is most emphatic, stating in *Porter v. Califano*, 592 F.2d 770 (5th Cir., 1979),

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[4] Again, although the court relied on respondents' extra-record submissions to support the Department's predictions of disruption, it refused to consider Greer's extra-record submissions to the contrary. After Greer was terminated, Amesqua's own arbitrary and discriminatory management (including her patent favoritism towards Holtz in reviewing Holtz's abuse of Cato and several other personnel) led Local 311 to issue a scathing indictment of Amesqua's leadership titled the "Local 311 Report." Following the report, Local 311 conducted an unprecedented, highly publicized, overwhelming vote of no confidence against Amesqua. (Greer Affidavit, ¶¶ 51, 152, 155, Pet.-Ap. 208a - 212a). Had the PFC investigated and acted upon the Greer's legitimate complaints about Amesqua's favoritism instead of "killing the messenger," the catastrophic disruption might well have been avoided.

> The First Amendment balancing test can hardly be *controlled* by a finding that disruption did occur. An employee who *accurately* exposes rampant corruption in her office no doubt may disrupt and demoralize much of the office. But it would be *absurd* to hold the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office.

Id., 592 F.2d at 773 - 74. (Emphases added.) In *Brawner v. City of Richardson*, 855 F.2d 187 (5th Cir., 1988), the court also concluded that

> If the allegations of internal misconduct are indeed true, [the employee's] statements could not have adversely affected the proper functioning of the department *Porter v. Califano*, 592 F.2d 770 (5th Cir., 1979), since the statements were made for the very reason that the department was not functioning properly due to corruption.

Id., 855 F.2d at 192. Considering a whistle blower's criticism in a prison setting, it said, "[W]hen weighed against the exposure of unethical medical practices affecting hundreds of inmates, the disruption is a minimal interest." *Frazier v. King*, 873 F.2d 820 (5th Cir., 1989), *cert. den., Davoli v. Frazier*, 493 U.S. 977 (1989).

The Third Circuit adopted the Fifth Circuit's strong *Porter* language in both *Czurlanis v. Albanese*, 721 F.2d 98, 105 (3d Cir. 1983) and *O'Donnell v. Yanchulis*, 875 F.2d 1059 (3rd Cir. 1989). In *O'Donnell*, the court stated, "The public has a significant interest in encouraging legitimate whistle blowing so that it may receive and evaluate information concerning the alleged abuses of these public officials." *Id.*, 875 at 1062.

The First Circuit also explicitly recognizes that the interests in protecting employee's statements increase in relation to the truth and sincerity of the statements. In *Brasslett v. Cota*, 761

F.2d 827 (1st Cir.1985), the mayor and town council terminated the fire chief for criticizing the condition of department trucks during a televised interview. *Id.*, 761 F.2d at 831 - 32. The court held that the truth of the chief's statements was critical: "[A]n employer has a greater interest in curtailing erroneous statements than correct ones, and still a greater interest in curtailing deliberate falsehoods. . . . . *Correspondingly, an employee's interest in making public statements is heightened according to their veracity . . . .*" *Id.*, 761 F.2d at 839 (emphasis added). Citing *Pickering*, the First Circuit also held in *Santos v. Miami Region, United States Customs Service*, 642 F.2d 21 (1st Cir. 1985) that "In those circumstances in which the employee's critical comments 'on matters of public concern,' [*Pickering*], " 391 U.S. at 570 . . . are "substantially correct," *Id.*, they cannot "furnish grounds for dismissal."*Santos*, 642 F.2d at 25 (citations omitted).

In *Johnson*, the Ninth Circuit also outlines a "sliding scale" based on the relative truth and sincerity of the employee's statements. It observed that there is a "very limited" interest in protecting even recklessly false statements in order to create "breathing space" for robust public debate, but "The First Amendment interest in protecting merely inaccurate statements made in good faith . . is a good deal stronger." *Johnson*, 48 F.3d at 426, n. 5 (citations omitted). In *Roth v. Veterans Admin.*, 856 F.2d 1401 (9th. Cir., 1988), the court stated, "We would expect 'whistleblowing,' by its very nature, to engender some hostility and resistance." *Id.* 856 F.2d at 1407. The court then incorporated the Fifth Circuit's holding in *Porter* that it would be "absurd" to believe that the First Amendment authorizes corrupt officials to punish legitimate whistle blowers. *Roth*, 856 F.2d at 1407 - 1408 (citing *Porter*, 592 F.2d at 773 - 74).

The Tenth Circuit, considering a police officer's accusations of misconduct by fellow officers, stated, "When balancing the rights of the employee against those of the employer, an

employee's First Amendment interest is entitled to greater weight where he is acting as a whistle blower in exposing government corruption." *Lytle v. City of Haysville*, 138 F.3d 857, 865 (10th Cir. 1998). Correspondingly, "[A] government employee's interest in whistleblowing is entitled to little weight if a reasonable person in his shoes would not have believed that there was government corruption or wrongdoing." *Id.*, 138 F.3d at 866 (citations omitted). As Greer urged in this case, the court concluded that "under the *Pickering* inquiry, we must consider whether there was a reasonable basis for [the officer's] allegations . . . ."*Id.*, 138 F.3d at 866.

The *Greer* decision creates confusion even within the Seventh Circuit. In *Wright v. Ill. Dept. of Children & Family Services*, 40 F.3d 1492 (7th Cir., 1994), the plaintiff was fired for criticizing her superiors while testifying in a juvenile hearing. Citing *Waters*, 511 U.S. 667 *Wright* held that First Amendment protection did not "*directly* hinge on the accuracy of her utterances" because her employers could punish her if they "reasonably believed after an *adequate* investigation, that her testimony was false, even if it actually was true . . . ."*Id.*, 40 F.3d at 1506. (Emphases added.)

The court distinguished *Wright* from Greer's case by holding that an employee has an "enhanced interest in telling the truth when sworn to do so before 'an official government adjudicatory or fact-finding body . . . .'" *Greer*, 212 F.3d at 373 (Pet.-Ap. 25a). *Wright* does hold that the interests in protecting subpoenaed testimony are "compelling" if the speech is truthful, *Wright*, 40 F.3d at 1505, but it does not follow that interests in truth are non-existent for any other kind of speech. Further, the court's distinction conflicts with *Wright* itself. Following *Brasslett* and *O'Connor v. Steeves*, 994 F.2d 905, 912 (1st Cir. 1993), *cert. denied*, 510 U.S. 1024 (1993) (neither of which involved sworn testimony), the Seventh Circuit stated in *Wright*,

> As the First Circuit has recognized, "an employer has a greater interest in curtailing erroneous statements than correct ones, and still a greater interest in curtailing deliberate falsehoods," and "[c]orrespondingly, an employee's interest in making public statements is heightened according to their veracity." *Id.* (citing *Brasslett v. Cota*, 761 F.2d 827, 839 (1st Cir.1985)). Following from this analysis, it would be proper for a court to further distinguish between negligent inaccuracies and malicious falsehoods for purposes of applying the *Pickering* test.

Wright, 40 F.3d at 1505 – 1506. (*O'Connor*, 994 F.2d at 912, *cert. denied*, 510 U.S. 1024 (1993) (citations to *Brasslett* included).

Wright also relied on Seventh Circuit precedent, *Feldman v. Bahn*, 12 F.3d 730 (7th Cir. 1993), *cert. den.*, 513 U.S. 1014 (1994), in which a state university professor's contract was not renewed after he accused a colleague of plagiarism. Again, adjudicatory testimony was not at issue. As urged by Greer in this case, the court described a "sliding scale" based on veracity and sincerity, stating,

> On receiving a charge of intellectual dishonesty, a university should investigate. . . . . If the charge is correct, the plagiarist should be disciplined; if the charge is unfounded, the accuser should be disciplined; if there is some basis for the charge, but the university believes that the accusation is unproven, then no one should be disciplined . . . . *Which of these three outcomes is appropriate depends . . . on the truth of the accusation and the care the accuser took before making it.*

Feldman v. Bahn, 12 F.3d at 731 (emphasis added).

And in *Marshall v. Allen*, 984 F.2d 787 (7th Cir., 1993), a housing authority employee was discharged for statements that his employer engaged in illegal gender based discrimination.

The court held that "if Mr. Marshall's allegations are true, defendants would have violated his constitutional rights when they discharged him." *Id.*, 984 F.2d at 794. Like Greer's allegations of illegal discrimination in this case, Marshall's allegations of discrimination were not sworn testimony, either.

In summary, the court of appeals decision in this case sets a troubling precedent in disharmony with the overwhelming authority of other circuits and with numerous decisions in its own case law.

II. THIS CASE PRESENTS IMPORTANT CONSTITUTIONAL QUESTIONS

It is difficult to conceive an issue more essential to democratic government than the protection of employees who expose corruption and malfeasance within its agencies. While *Pickering* and *Waters* provide a functional rubric for employee speech cases generally, this case presents an exceptional opportunity to provide guidance for the circuits on several critical issues arising from employee claims of retaliation for legitimate whistle blowing.

An enormous body of literature has developed from this Court's "reckless or false" comment in *Pickering*. While that comment has provided general guidance for over three decades, the circuits have developed conflicting doctrines governing the significance of the truth of employee statements. Citing *Johnson*, 48 F.3d at 424-25, the district court noted that the circuits are split on whether reckless, profane or disparaging statements are unprotected *per se*. *Greer*, 22 F.Supp.2d at 928. (Pet.-Ap. 90a.) Discussing *Brenner v. Brown*, 36 F.3d 18, 20 (7th Cir. 1994) (*per curiam*), the court concluded that the Seventh Circuit considers them unprotected *per se*, and also questions whether an employee's speech is protected even if he has "reliable but second hand knowledge" rather than "first hand knowledge" of the incident he comments on. *Id.*

One commentator has noted that this Court "has not resolved the question of when, if ever, recklessly or knowingly false statements of public employees about matters of public concern are protected by the Constitution." Howard C. Nielson, Jr., *Recklessly False Statements in the Public-Employment Context*, 63 U.Chi.L. Rev. 1277-78 (1996). The circuits have developed two conflicting approaches to that issue, one holding recklessly false statements unprotected *per se* and the other providing a variety of circumstances under which such speech might be protected. *Id.*

In light of such fundamental disagreement over the function of "veracity" and "sincerity," the circuits would be well served by developing a more comprehensive structure for analyzing those factors, especially in the critical context of whistle blower cases. That is, in applying the *Pickering* balance, what is the significance of the employee statements' relative basis in fact? Are they true, false, or somewhere in between? And what is the significance of the speaker's care in making them? Was he careful, reckless, or somewhere in between? The focal issues and well-developed, detailed record in this case present an exceptional opportunity to develop such a structure.

This case also presents the first opportunity for this court to apply the *Pickering* balance in the context of allegations of discrimination based on sexual orientation. As more states and municipalities adopt proscriptions against discrimination on that basis, and as more homosexuals achieve upper management positions, it is to be expected that (as in this case) scrutiny for illegal favoritism based on sexual orientation will also increase. As noted in the lower court decisions, because of negative societal views of homosexuality, such scrutiny raises a "privacy" concern. This case presents an excellent opportunity to determine whether "privacy" may be a significant government interest in the *Pickering* balance and whether homosexuals in management positions will be excepted to some degree from the same scrutiny and "public

figure" analysis as other management personnel accused of illegal discrimination based on race and gender.

This case also illustrates a critical need for additional procedural guidance in applying the *Waters* requirement of a reasonable investigation -- both for employers conducting the investigation and for courts reviewing the employer's conduct in subsequent civil rights actions. In this case, by approving the employer's reliance in district court on evidence it neither considered nor relied on in its investigation, the courts virtually gutted the *Waters* requirement that the employer base its discharge decision on facts determined *at the time of its investigation*. *Waters*, 511 U.S. at 667. If the procedure approved in this case is allowed to stand, *Waters* will be meaningless. Besides being excused from investigating whether a whistle blower's statements have any merit, an employer may simply fire the employee and, when later challenged in a civil rights action, develop a *post hoc* justification based on evidence not present at the time of the discharge.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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